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Stephen R. Oliver

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# CALIFORNIA GOVERNMENTAL IMMUNITY FROM MALICIOUS PROSECUTION LIABILITY: "THERE OUGHTA BE A LAW"

## INTRODUCTION

The California Court of Appeal for the First District recently decided *Collins v. City & County of San Francisco*.<sup>1</sup> In 1968 Collins was arrested for unlawful assembly. Two misdemeanor courts were dismissed, but Collins was found guilty of a remaining charge, fined and given a suspended sentence.<sup>2</sup> Dissatisfied, the arresting officer swore out a more factually detailed complaint; an arrest warrant was issued and placed in the warrant files, even though the dismissal of the two misdemeanor charges operated as a bar to any other prosecution for the same offenses.<sup>3</sup> About a year later, Collins was arrested on the warrant and held in custody overnight before the charges were dismissed three days later.<sup>4</sup>

Collins brought suit against the City and County of San Francisco for false arrest on the theory that the city was liable for the officer's improper filing of the second complaint. The trial court granted a motion for summary judgment in favor of the defendant.<sup>5</sup> The court of appeal affirmed after recharacterizing the action as one for malicious prosecution rather than false arrest. This was significant because under California law both the city and the officer are immune from liability for malicious prosecution, but not for false arrest.<sup>6</sup>

This comment discusses the policy, illustrated by *Collins*, of shielding governmental entities from liability for malicious prosecution. The tort of malicious prosecution is defined and outlined. Because false imprisonment and false arrest are sometimes confused with malicious prosecution, they are briefly contrasted.

The comment then reviews the major California cases and the pertinent provisions of the California 1963 Tort Claims Act,<sup>7</sup> which codified the law in this area. Finally, this comment criticizes the foundations of governmental immunity from ma-

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1. 50 Cal. App. 3d 671, 123 Cal. Rptr. 525 (1975).

2. *Id.* at 675, 123 Cal. Rptr. at 527.

3. CAL. PENAL CODE § 1387 (West 1970). This section does not apply to felonies.

4. 50 Cal. App. 3d at 675, 123 Cal. Rptr. at 527.

5. *Id.* at 673, 123 Cal. Rptr. at 526.

6. *Id.* at 679, 123 Cal. Rptr. at 530.

7. CAL. GOV'T CODE § 810 *et seq.* (West 1966).

licious prosecution liability, noting the position of other commentators and the California Law Revision Commission. The comment concludes by pointing to the need to create some type of remedy for those who have been prosecuted without basis by a government entity or official.

### MALICIOUS PROSECUTION

Malicious prosecution is defined as an action "for recovery of damages which have proximately resulted to person, property, or reputation from a previous unsuccessful civil or criminal proceeding, which was prosecuted without probable cause and with malice."<sup>8</sup> A California statute provides that such an initiation of criminal proceedings is a misdemeanor.<sup>9</sup>

The tort exists where the following elements are shown: 1) initiation of judicial proceedings<sup>10</sup> against the present plaintiff by the present defendant;<sup>11</sup> 2) the bona fide termination of such proceeding in favor of the present plaintiff; 3) the absence of probable cause for the institution of such proceeding; 4) the presence of malice in the institution of such proceeding; and 5)

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8. 54 C.J.S. *Malicious Prosecution* § 1 (1948). The tort of malicious prosecution of criminal proceedings occurs "when one citizen initiates or procures the initiation of criminal proceedings against an innocent person, for an improper purpose and without probable cause therefore, if the proceeding terminate favorably for the person thus prosecuted." 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 300 (1956).

9. CAL. PENAL CODE § 170 (West 1970).

10. In the past, the prior proceeding had to be a judicial proceeding, however this was changed by case law to allow an action for malicious prosecution to be founded on the institution of proceedings before an administrative agency. *Hardy v. Vial*, 48 Cal. 2d 577, 581, 311 P.2d 494, 496 (1957), *overruling Hayashida v. Kakimoto*, 132 Cal. App. 743, 23 P.2d 311 (1933), and *Lorber v. Storrow*, 22 Cal. App. 2d 25, 70 P.2d 513 (1937). See generally 4 B. WITKIN, *SUMMARY OF CALIFORNIA LAW* 2536 (8th ed. 1974); 31 S. CAL. L. REV. 105 (1957).

11. To be the legal cause of a malicious prosecution it is not necessary that the defendant be the one who personally signed a complaint or affidavit. It is enough that the defendant was instrumental in setting the law in motion. *Sandoval v. Southern Cal. Enterprises, Inc.*, 98 Cal. App. 2d 240, 248, 219 P.2d 928, 934 (1950). A defendant is not deemed to be the legal cause if, acting in good faith, he simply states the true facts to the authorities, leaving to them such action as they deem proper. *Gogue v. MacDonald*, 35 Cal. 2d 482, 487, 218 P.2d 542, 545 (1950) (defendant complained that plaintiff tenant had moved without paying). As a defense the defendant may assert that he acted on the advice of an attorney, however this defense will not be good unless he made a full and complete disclosure of facts to the attorney. If a full disclosure of the facts is not made the court may find, by implication, malice and want of probable cause. *Schubkegel v. Gordino*, 56 Cal. App. 2d 667, 671-72, 133 P.2d 475, 478-79 (1943).

In actions concerning private parties there can be respondeat superior liability for the acts of agents. Such liability, even to the extent of punitive damages, may be imposed even if the corporation merely impliedly ratifies the wrongful acts of its agents by not firing them after the event. *Sandoval v. Southern Cal. Enterprises, Inc.*, 98 Cal. App. 2d at 250, 219 P.2d at 936 (1950).

damage to the plaintiff from the proceeding.<sup>12</sup> California litigation in the area has focused on the elements of favorable termination, want of probable cause and malice.<sup>13</sup>

### *Malice and Want of Probable Cause*

The closely related requirements of malice and want of probable cause are the basic elements of an action for malicious prosecution. Malice may be inferred from the lack of probable cause, but want of probable cause may not be inferred from malice.<sup>14</sup> In order to find malice it is not necessary to show that the prosecution was inspired by actual hostility or feelings of ill will toward the plaintiff.<sup>15</sup> What is required is evidence which establishes "bad faith," or the lack of a sincere belief that the prosecution was justified by the facts.<sup>16</sup> Malice may be found where the primary purpose of the defendant was something other than the bringing of an offender to justice.<sup>17</sup>

The plaintiff also has the burden of showing want of probable cause.<sup>18</sup> In determining whether there was probable cause for the institution of the prior proceedings the question is not whether the plaintiff was guilty or civilly liable, but whether the defendant had probable cause to believe he was guilty.<sup>19</sup>

When the original action was criminal in nature, the existence of probable cause is not refuted by a showing that no crime was committed or that the accused was innocent,<sup>20</sup> but a judgment against the present plaintiff, unless procured by fraud, is conclusive proof that the proceedings were prosecuted with probable cause, even though that judgment is reversed on appeal.<sup>21</sup>

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12. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 883 (1941).

13. See, e.g. *Siffert v. McDowell*, 103 Cal. App. 2d 373, 376, 229 P.2d 388, 390 (1951).

14. *Centers v. Dollar Mkts.*, 99 Cal. App. 2d 534, 542, 222 P.2d 136, 142 (1950).

15. *Albertson v. Raboff*, 46 Cal. 2d 375, 383, 295 P.2d 405, 410 (1956).

16. *Singleton v. Singleton*, 68 Cal. App. 2d 681, 696, 157 P.2d 886, 894 (1945) (grand theft complaint signed by plaintiff's brother).

17. *Bulkley v. Klien*, 206 Cal. App. 2d 742, 750, 23 Cal. Rptr. 855, 859 (1962) (defendant charged plaintiff with theft out of personal animosity).

18. *Haydel v. Morton*, 8 Cal. App. 2d 730, 732, 48 P.2d 709, 710 (1935).

19. *White v. Brinkman*, 23 Cal. App. 2d 307, 312-13, 73 P.2d 254, 256 (1937).

20. *Haydel v. Morton*, 8 Cal. App. 2d 730, 733, 48 P.2d 709, 710 (1935).

21. *Norton v. John M.C. Marble Co.*, 30 Cal. App. 2d 451, 454, 86 P.2d 892, 894 (1939). However, the fact that the present plaintiff won in the previous proceeding does not negative the existence of probable cause. *Sebastian v. Crowley*, 38 Cal. App. 2d 194, 203, 101 P.2d 120, 124 (1940) (probable cause existed to believe plaintiff actress was involved in scheme to defraud hotel owner by not paying bill).

*Termination of the Prior Proceeding*

The rule that the prior proceeding must be favorably terminated is strictly applied in California. The rule prevents inconsistent judgments and makes the determination of the existence of probable cause and malice easier because of the presumptions which flow from a favorable termination.<sup>22</sup> The question of what is meant by a favorable termination has been addressed in several cases. Termination does not mean that there must be a determination on the merits,<sup>23</sup> or that the proceedings are incapable of revival.<sup>24</sup> It is only necessary to show that in order to proceed further, the prosecutor or civil litigant would have to institute proceedings de novo.<sup>25</sup> A termination of the proceeding on technical or procedural grounds not inconsistent with the party's culpability does not constitute a favorable termination,<sup>26</sup> although a voluntary dismissal is considered a favorable termination which will support an action for malicious prosecution.<sup>27</sup>

*Malicious Prosecution Distinguished from False Arrest and False Imprisonment*

As can be seen from the *Collins* case, the distinction between an action for false arrest or false imprisonment and malicious prosecution is important primarily because of the governmental immunity which attaches to malicious prosecution actions.

California defines false imprisonment by statute as "the unlawful violation of the personal liberty of another."<sup>28</sup> The restraint of liberty need not be accomplished by active force. "A person is falsely imprisoned if he is wrongfully deprived of his freedom to leave a particular place by the conduct of an-

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22. *Babb v. Superior Court*, 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971). But see *Munson v. Linnick*, 255 Cal. App. 2d 589, 63 Cal. Rptr. 340 (1967). For a discussion of the problems which may be involved where the termination rule is not followed, see Note, *Counterclaim for Malicious Prosecution in the Action Alleged to be Malicious*, 58 YALE L.J. 490 (1949).

23. *Hurgren v. Union Mutual Life Ins. Co.*, 141 Cal. 585, 587, 75 P. 168, 169 (1904).

24. *MacDonald v. Joslyn*, 275 Cal. App. 2d 282, 289, 79 Cal. Rptr. 707, 711 (1969) (action for malicious prosecution of will contest).

25. *Jaffe v. Stone*, 18 Cal. 2d 146, 157, 114 P.2d 335, 341 (1941) (grand theft proceedings against plaintiff dismissed).

26. *Id.* at 150, 114 P.2d at 338.

27. *MacDonald v. Joslyn*, 275 Cal. App. 2d at 289, 79 Cal. Rptr. at 711.

28. CAL. PENAL CODE § 236 (West 1970).

other. . . . Words or conduct furnishing a reasonable apprehension on the part of the one restrained that he will not be allowed to depart is sufficient.”<sup>29</sup> Usually false imprisonment and false arrest are discussed as if they were the same, and for most purposes no distinction need be drawn—although there are situations where the false “imprisonment” does not originate with a false “arrest,” but exists independently because of delay in taking a person before a magistrate,<sup>30</sup> or failing to release after bail has been delivered.<sup>31</sup>

Stated simply, the distinction between malicious prosecution and false imprisonment is that in malicious prosecution the detention is malicious, but under due forms of law, whereas in false imprisonment the detention is without color of legal authority.<sup>32</sup> If the plaintiff was

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29. *Schanafelt v. Seaboard Fin. Co.*, 108 Cal. App. 2d 420, 422-23, 239 P.2d 42, 43 (1951).

30. *Williams v. Zelzah Warehouse Co.*, 126 Cal. App. 28, 14 P.2d 177 (1932).

31. *Shakespeare v. City of Pasadena*, 230 Cal. App. 2d 375, 386, 40 Cal. Rptr. 863, 870 (1964). Although many false imprisonment cases arise out of warrantless arrests, they occur even where a warrant was issued. California still adheres to the rule of an old case which held that even if an arrest warrant is issued, where the charge does not constitute a crime, the remedy is an action for false imprisonment, not malicious prosecution. *Krause v. Spiegel*, 94 Cal. 370, 373, 29 P. 707, 708 (1892) (defendant caused issuance of arrest warrant for slander). See also 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW 2523-24 (8th ed. 1974). In addition, an officer may be liable for false arrest or imprisonment if the warrant is void or invalid on its face. CAL. CIV. CODE § 43.5(a) (West 1954); *Muller v. Reagh*, 215 Cal. App. 2d 831, 837, 30 Cal. Rptr. 633, 637 (1963). Whether or not the warrant is valid on its face is not determined on the basis of scrutiny by a trained legal mind. The officer has a duty to execute the warrant unless it is patently irregular or void. *Collins v. City & County of San Francisco*, 60 Cal. App. 3d 671, 677, 123 Cal. Rptr. 525, 528-29 (1975).

For a full discussion of the “valid on its face” warrant requirement see 57 OP. CAL. ATT’Y GEN. 542 (1974). See also *Vallindras v. Massachusetts Bonding & Ins. Co.*, 42 Cal. 2d 149, 154, 265 P.2d 907, 910-11 (1954), wherein the court stated that “all that is required to make process fair on its face is that it must proceed from a court having jurisdiction of the subject matter and that it contain nothing which ought reasonably to appraise the officer that it was issued without authority.” An officer may still be liable for false imprisonment even with a valid warrant if he carelessly arrests the wrong party by failing to take reasonable precautions to ascertain that the person arrested is the party against whom the warrant was issued. *Smith v. Madruga*, 193 Cal. App. 2d 543, 546-47, 14 Cal. Rptr. 389, 390 (1961). But an officer will be shielded from liability if the arrest was made by a private citizen who delivered the party to the officer, in which case the remedy is against the private citizen. CAL. PENAL CODE § 847 (West 1970); *Kinney v. County of Contra Costa*, 8 Cal. App. 3d 761, 87 Cal. Rptr. 638 (1970). If an action for false imprisonment is alleged on the basis of an arrest made without a warrant, it is also necessary to allege lack of probable cause. *Wilson v. County of Los Angeles*, 21 Cal. App. 3d 308, 315, 98 Cal. Rptr. 525, 530 (1971).

32. *Collins v. City & County of San Francisco*, 50 Cal. App. 3d 671, 676, 123 Cal. Rptr. 525, 528 (1975).

arrested or confined without a warrant . . . malicious prosecution will not lie, since the essence of that tort is the perversion of proper legal procedure, and the remedy is false imprisonment. On the other hand, if there is a valid process or due authority apart from it, the arrest is not "false" and the action must be one of malicious prosecution.<sup>33</sup>

The two actions, therefore, are said to be inconsistent.

An action for false arrest or false imprisonment is based on the illegality of the arrest or detention. As nothing done after the illegal act can "legalize" it, there is no requirement that a prior proceeding be "terminated" as there is in an action for malicious prosecution.<sup>34</sup> Similarly, provocation, motive and good faith are not elements of an action for false arrest unless punitive or exemplary damages are sought.<sup>35</sup> But as in actions for malicious prosecution, the defendant must have taken some active part in bringing about the unlawful arrest. He is not liable if, acting in good faith, he merely gives information to the authorities.<sup>36</sup>

Application of the principles to the facts in the *Collins* case reaffirms the court's recharacterization of the action. In *Collins* the officer made the arrest pursuant to a warrant which was valid on its face. It was the filing of the warrant in the first place which was improper, and the remedy for this "perversion of proper legal procedure" is an action for malicious prosecution. The officer who swore out the complaint "instituted" the proceeding against Collins, which "terminated" in his favor with the dismissal of charges. Though it appears there was "probable cause" to believe that Collins committed the offense, the presence of "malice" and "damages" would also have to be established.

Despite the legal orthodoxy of the relabelling by the court,

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33. *Id.* at 677, 123 Cal Rptr at 528, citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS 646 (2d ed. 1955). Another distinction between the two actions is that for false imprisonment the early remedy was an action for trespass, since that tort was considered a direct interference with the plaintiff's person. The remedy for malicious prosecution was an action on the case because that tort was regarded as more indirect. *Id.* at 676-77, 123 Cal. Rptr. at 528, citing W. PROSSER, *supra*, at 53. An action on the case was a common law personal action which was for the recovery of damages for torts not committed with force, or, if force was used, the injury was not immediate, but consequential. BLACK'S LAW DICTIONARY 51 (rev. 4th ed. 1968).

34. *Singleton v. Perry*, 45 Cal. 2d 489, 495, 289 P.2d 794, 798 (1955).

35. *Id.* at 494, 289 P.2d at 798.

36. *Wilson v. County of Los Angeles*, 21 Cal App. 3d 308, 317, 98 Cal. Rptr. 525, 530 (1971). See note 11 *supra*.

it prevented Mr. Collins from proving any of these elements, and barred him from any remedy whatsoever because the municipality and its employees are immune from malicious prosecution liability.

#### GOVERNMENTAL IMMUNITY AND MALICIOUS PROSECUTION

Governmental tort liability in California is regulated by statute.<sup>37</sup> However, as background to the growth of judicial thought in the malicious prosecution cases, one particular concept of general governmental immunity should be briefly reviewed.<sup>38</sup>

Governmental tort liability has sometimes turned on a distinction made between acts of municipal employees which are ministerial in nature and those that were discretionary in nature. If an act was ministerial, that is, mandatory in certain situations, then the failure to perform the act as required could give rise to employee tort liability.<sup>39</sup> However, an employee would be immune from liability for acts performed within his discretion,<sup>40</sup> such as the decision whether or not to institute criminal proceedings. This distinction often appeared in malicious prosecution cases and the distinction is retained in the California Government Code.<sup>41</sup>

The basic shield to malicious prosecution liability had its

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37. See text accompanying notes 99-104 *infra*.

38. Early cases in the area of malicious prosecution were concerned with the individual's liability as a public employee because the government entity itself was generally protected by concepts of sovereign immunity, although certain distinctions were often made. For example, municipal liability was often determined on the basis of whether a proprietary or governmental function was involved. A municipality was immune from liability for torts arising from its governmental functions, such as police or fire protection, but could be liable for torts arising from the exercise of its proprietary functions, such as the maintenance of public property. Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 441-44 (1941). For application of the governmental-proprietary function distinction in California see *People v. Superior Court*, 29 Cal. 2d 754, 178 P.2d 1 (1947); *Oppenheimer v. City of Los Angeles*, 104 Cal. App. 2d 545, 232 P.2d 26 (1951); *Norton v. Hoffman*, 34 Cal. App. 2d 189, 93 P.2d 250 (1939).

Later cases still focused on the individual employee's liability, and it is reflected in the structure of the Government Code. If a government employee is immune from liability his government employer cannot be liable. See text accompanying notes 101-04, 111, 119, 124 *infra*.

39. *Downer v. Lent*, 6 Cal. 94, 96 (1856).

40. *Id.* See also *Oppenheimer v. Arnold*, 99 Cal. App. 2d 872, 222 P.2d 940 (1950); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Comment, *Discretionary Immunity in California in the Aftermath of Johnson v. State*, 15 SANTA CLARA LAW. 454 (1975).

41. See text accompanying note 101 *infra*.



origins in the concept of "quasi-judicial" immunity. In California the principal that a judicial officer is not liable for acts done in his official capacity and within his jurisdiction was well established at an early date.<sup>42</sup> The rationale for this policy is that judges need such protection in order to function independently and without fear of liability.<sup>43</sup> This policy was extended to include those whose duties were "quasi-judicial."<sup>44</sup> In the 1856 case of *Downer v. Lent*<sup>45</sup> the California Supreme Court held that the Board of Pilot Commissioners, which had revoked the license of a San Francisco port pilot, exercised a quasi-judicial power, and public policy required that it be allowed to exercise its judgment and discretion without being civilly liable.<sup>46</sup> The court distinguished the discretionary action taken by the Board from actions which were ministerial in nature, stating that a ministerial officer who fails to execute his well-defined duties does so at his peril, but that an officer entrusted with duties which require the exercise of judgment should be protected from any consequences of error.<sup>47</sup>

Quasi-judicial immunity has been extended in malicious prosecution cases to grand jurors,<sup>48</sup> public prosecutors,<sup>49</sup> building inspectors,<sup>50</sup> and other public officials.<sup>51</sup> The policy behind this extension was explained in 1935 by the court of appeal in *Pearson v. Reed*:

The doctrine of immunity is not for the benefit of the few who might otherwise be compelled to respond in damages. It is for the benefit of all to whom it applies, that they may be free to act in the exercise of honest judgment, uninfluenced by fear of consequences personal to themselves. This again is not for their personal advantage or benefit. It is

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42. *Going v. Dinwiddie*, 86 Cal. 633, 637, 25 P. 129, 129 (1890).

43. Put another way, if there were not such an immunity, "no man but a beggar, or a fool, would be a judge." L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 241 (1965) quoting *Miller v. Hope*, 2 Shaw H.L. 125, 134 (Scot., 1824) [hereinafter cited as JAFFE].

44. *Turpen v. Booth*, 56 Cal. 65 (1880).

45. 6 Cal. 94 (1856).

46. *Id.* at 96.

47. *Id.*

48. *Turpen v. Booth*, 56 Cal. 65, 67 (1880).

49. *Pearson v. Reed*, 6 Cal. App. 2d 277, 44 P.2d 592 (1935).

50. *Dawson v. Martin*, 150 Cal. App. 2d 379, 309 P.2d 915 (1957); *White v. Brinkman*, 23 Cal. App. 2d 307, 73 P.2d 254 (1937).

51. *White v. Towers*, 37 Cal. 2d 727, 235 P.2d 209 (1951) (State Fish and Game Commission investigator).

only that they be enabled to render a better public service.<sup>52</sup>

In 1942 the court of appeal in *Prentice v. Bertken*<sup>53</sup> temporarily limited this extension. The court recognized that it was settled public policy to protect judicial and quasi-judicial officers acting within the scope of their jurisdiction from malicious prosecution liability, even though the officer had acted without probable cause and with malice.<sup>54</sup> But the court believed that public policy did not require that the exemption be extended to peace officers who maliciously and without probable cause initiated a prosecution against a citizen, stating that "the briefest reflection will lead one to conclude that to do so might be dangerous to the rights of a free people and lead to great oppression and injustice."<sup>55</sup> This reasoning and this language was disapproved nine years later by the California Supreme Court in *White v. Towers*.<sup>56</sup>

### *The Major California Cases Confirming Immunity*

The major cases in the area of immunity for public officials from malicious prosecution liability were decided by the Cali-

52. 6 Cal. App. 2d 277, 288, 44 P.2d 592, 597 (1935).

53. 50 Cal. App. 2d 344, 123 P.2d 96 (1942).

54. *Id.* at 350, 123 P.2d at 99.

55. *Id.*

56. 37 Cal. 2d 727, 732, 235 P.2d 209, 212 (1951). Another obstacle to malicious prosecution actions had been the argument that actions for malicious prosecution "are not favored in the law." *Sebastian v. Crowley*, 38 Cal. App. 2d 194, 202, 101 P.2d 120, 124 (1940). This expression was explained by the California Supreme Court in the 1941 case of *Jaffe v. Stone*, 18 Cal. 2d 146, 114 P.2d 335 (1941):

The frequency with which this statement is made in these cases calls attention to the need of some explanation. Properly applied, it means that public policy is in favor of the apprehension and punishment of criminals, and limits the person complaining of criminal charges by placing upon him the burden of proving the basic elements of the tort. . . . But where the difficult burden of proof is met by the plaintiff, recovery is allowed. This being true, we should not be led so astray by the notion of a "disfavored" action as to defeat the established rights of the plaintiff by indirection; for example, by inventing new limitations on the substantive right, which are without support in principle or authority . . . .

*Id.* at 159, 114 P.2d at 342.

Later decisions pointed to this language when the issue arose, which it often did because defendants would attempt to use the expression "not favored at law" as the basis of an affirmative defense against plaintiffs suing them for malicious prosecution. *Siffert v. McDowell*, 103 Cal. App. 2d 373, 229 P.2d 388 (1951); *Singleton v. Singleton*, 68 Cal. App. 2d 681, 157 P.2d 886 (1945). The "not favored at law" statement is still being repeated in cases as an expression by the courts that they do not want such actions to be used as harassing devices. *Babb v. Superior Court*, 3 Cal. 3d 841, 847, 479 P.2d 379, 382, 92 Cal. Rptr. 179, 182 (1971).

for California Supreme Court in the 1950's. The first of these was the 1951 case of *White v. Towers*.<sup>57</sup> In *White*, the plaintiff had been acquitted in two separate proceedings of polluting waters. He brought an action for malicious prosecution against the investigator for the State Fish and Game Commission who had instituted the prosecutions against him.<sup>58</sup> A demurrer without leave to amend was affirmed.<sup>59</sup> The court believed that "sound reasons of public policy require that a peace officer, or other comparable official, be shielded by the cloak of immunity from civil liability for alleged malicious prosecution"<sup>60</sup> when acting within the scope of his authority. The contrary language of *Prentice v. Bertken* was disapproved.<sup>61</sup> The court stated that "[b]ecause of their tendency to obstruct the administration of justice, it is the policy of the law to discourage actions for malicious prosecution."<sup>62</sup> The court answered the argument that such an extension of immunity was a step toward "statism" or a "police state" by pointing out that the individual was protected by the penal statute which made malicious prosecution a misdemeanor,<sup>63</sup> and that officials who failed to conduct themselves properly could be ousted from office.<sup>64</sup>

Three justices dissented, including the late Justice Carter, who argued that the injured party had been denied his day in court;<sup>65</sup> that the holding was a step toward statism;<sup>66</sup> and that the privilege of immunity should not have been extended to a person whose duties, power and authority were undefined.<sup>67</sup>

*Coverstone v. Davies*<sup>68</sup> was decided by the California Supreme Court in 1952. The court applied the principle announced in *White v. Towers* and stated that no cause of action could be sustained against a deputy sheriff and his captain for malicious prosecution, on the basis that they were acting within the scope of their authority in instituting the criminal

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57. 37 Cal. 2d 727, 235 P.2d 209 (1951).

58. *Id.* at 728-29, 235 P.2d at 210.

59. *Id.* at 734, 235 P.2d at 214.

60. *Id.* at 729, 235 P.2d at 211.

61. *Id.* at 732, 235 P.2d at 212.

62. 37 Cal. 2d at 730, 235 P.2d at 211, quoting *Watts v. Gerking*, 111 Ore. 641, 669, 228 P. 135 (1924).

63. 37 Cal. 2d at 733, 235 P.2d at 213, citing CAL. PENAL CODE § 170 (West 1970).

64. 37 Cal. 2d at 730, 235 P.2d at 211.

65. *Id.* at 737, 235 P.2d at 215 (dissenting opinion).

66. *Id.* at 738, 235 P.2d at 216 (dissenting opinion).

67. *Id.* at 735, 235 P.2d at 214 (dissenting opinion).

68. 38 Cal. 2d 315, 239 P.2d 876 (1952).

proceedings.<sup>69</sup> Justice Carter dissented from the affirmance of a judgment of nonsuit.<sup>70</sup> He wrote that there was some evidence of lack of probable cause and that the majority opinion was "another step in support of the police state philosophy."<sup>71</sup>

A false imprisonment case, *Miller v. Glass*,<sup>72</sup> came before the California Supreme Court in 1955. Law enforcement officers of the California Department of Fish and Game had arrested the plaintiff for a misdemeanor not committed within their presence.<sup>73</sup> The court reversed a summary judgment for the defendants,<sup>74</sup> stating that "[d]ifferent principles govern actions for false arrest and imprisonment, for the law expressly limits the arresting officer's authority."<sup>75</sup> Granting immunity from liability for arrests made without a warrant for misdemeanors not committed in the officer's presence would violate Penal Code section 836, which sets out the conditions under which an officer may make an arrest without a warrant.<sup>76</sup> Justice Carter concurred in the result, but restated his disagreement with *White v. Towers* and *Coverstone v. Davies*.<sup>77</sup>

Although these cases focused on the liability of individuals, it should be remembered that the governmental entity employing them enjoyed absolute immunity from suits for malicious prosecution. This was tersely restated in the 1957 decision of the Third District Court of Appeal in *Dawson v. Martin*.<sup>78</sup> In that case the plaintiff brought suit against a county building inspector for swearing out a complaint falsely charging violations of the building code.<sup>79</sup> The court held that

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69. *Id.* at 322, 239 P.2d at 880.

70. *Id.* at 324, 239 P.2d at 881.

71. *Id.* at 327, 239 P.2d at 883 (dissenting opinion).

72. 44 Cal. 2d 359, 282 P.2d 501 (1955).

73. *Id.* at 361, 282 P.2d at 502 (refusing to exhibit upon demand a California fishing license).

74. *Id.* at 363, 282 P.2d at 504.

75. *Id.* at 362, 282 P.2d at 503.

76. *Id.* at 363, 282 P.2d at 504. CAL. PENAL CODE § 836 (West 1970) provides that an officer may make an arrest without a warrant:

1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

2. When a person arrested has committed a felony, although not in his presence.

3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

77. 44 Cal. 2d at 363, 282 P.2d at 504.

78. 150 Cal. App. 2d 379, 309 P.2d 915 (1957).

79. *Id.* at 381, 309 P.2d at 916.

the county enjoyed absolute immunity from malicious prosecution suits, citing an earlier case which made the governmental function-proprietary function distinction.<sup>80</sup> The court also held that the building inspector was immune from liability because he was acting under direction of the county board of supervisors and only carrying out his duty.<sup>81</sup>

The California Supreme Court further extended the concept of immunity in 1957 in the case of *Hardy v. Vial*.<sup>82</sup> The plaintiff was a state college professor who was accused of unprofessional conduct and dismissed. He brought an action for malicious prosecution against college and Department of Education officials.<sup>83</sup> *Hardy* did away with the prior judicial proceeding requirement and stated that an action for malicious prosecution could be founded on the institution of prior proceedings before an administrative agency.<sup>84</sup> The court stated that the rule of absolute immunity, notwithstanding malice or other sinister motive, was not restricted to public officers who instituted criminal actions, but extended to all executive public officers when performing, within the scope of their authority, acts which require the exercise of discretion or judgment.<sup>85</sup> The court quoted from a Learned Hand opinion<sup>86</sup> which stated that the justification for denying recovery, even when an official used his power for personal wrongful motive, is that it is impossible to know whether a claim is well founded until the case has been tried, and that to allow all officials to be brought to trial for their decisions would be equally impossible.<sup>87</sup>

The *Hardy* court also held that the power of dismissal was within the school officer's authority and that the policy on which the rule of immunity was based "would be defeated if it were held that whenever an officer uses his office for a personal motive not connected with the public good he acts outside his

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80. *Id.* at 381-82, 309 P.2d at 917, citing *Norton v. Hoffman*, 34 Cal. App. 2d 189, 93 P.2d 250 (1939). See note 38 *supra*.

81. 150 Cal. App. 2d at 382, 309 P.2d at 917 (the supervisors were held to be immune on the basis of statutory construction). A petition for hearing by the Supreme Court was denied, although Justice Carter was of the opinion that it should have been granted. *Id.* at 385, 309 P.2d at 919.

82. 48 Cal. 2d 577, 311 P.2d 494 (1957).

83. *Id.* at 579, 311 P.2d at 495.

84. *Id.* at 581, 311 P.2d at 496. See note 10 *supra*.

85. 48 Cal. 2d at 582, 311 P.2d at 496.

86. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). See text accompanying note 138 *infra*.

87. 48 Cal. 2d at 582-83, 311 P.2d at 496-97.

power.”<sup>88</sup> The court held that the immunity protected the official even if he acts with others who are not immune.<sup>89</sup> The court stated, however, that a cause of action existed against the private defendant who participated in making the charges.<sup>90</sup>

In his dissent, Justice Carter charged that the court in the earlier cases “had not reached the peak of injustice that it has reached in the case at bar.”<sup>91</sup> He further stated that “the entire doctrine of governmental immunity rests upon a rotten foundation, and . . . it should be placed in the judicial garbage can where it belongs.”<sup>92</sup>

Commentators were also critical of the *Hardy* opinion. One writer was disappointed with the court for not limiting the extension of the immunity doctrine, particularly in a situation where an official acted in concert with outsiders.<sup>93</sup> Another noted that California was the only state extending malicious prosecution immunity to administrative officers, although this was also the federal approach, and argued that old common law ideas of immunity were inadequate to meet the needs of a society where a large percentage of the population works for the state and where state activities predominate.<sup>94</sup>

In 1961 the California Supreme Court decided *Muskopf v. Corning Hospital District*, which purported to hold that “the rule of governmental immunity from tort liability . . . must be discarded as mistaken and unjust.”<sup>95</sup> The court expressly declined to extend the effect of its holding to abolish the settled rules of immunity for government officials acting within the scope of their authority.<sup>96</sup> The court cited *Downer v. Lent* to support the rule of non-liability for the consequences of discretionary acts,<sup>97</sup> and *White v. Towers*, *Coverstone v. Davies*, and *Hardy v. Vial* to support the rule of non-liability even when the officials have allegedly acted with malice.<sup>98</sup>

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88. *Id.* at 583, 311 P.2d at 497.

89. *Id.* at 584, 311 P.2d at 497.

90. *Id.*

91. *Id.* at 586, 311 P.2d at 499 (dissenting opinion).

92. *Id.* at 587, 311 P.2d at 499 (dissenting opinion).

93. Note, *Are Public Officials Who Conspire with Outsiders Acting Within the Scope of Their Authority?*, 9 HASTINGS L.J. 81, 83-85 (1957).

94. Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303 (1959).

95. 55 Cal. 2d 211, 213, 359 P.2d 457, 458, 11 Cal. Rptr. 89, 90 (1961).

96. *Id.* at 220, 359 P.2d at 462, 11 Cal. Rptr. at 94.

97. *Id.*

98. *Id.* In support of the continuation of this policy the court repeated the language of *Learned Hand* which had been quoted in the *Hardy* case. See text accompanying note 138 *infra*.

Whatever effect the *Muskopf* decision had on other types of tort actions against government entities, it did not change the rules regarding malicious prosecution actions. That position was reinforced by the California legislature when it reacted to the *Muskopf* decision.

### *Codification of Immunity*

The legislature responded to the *Muskopf* decision by enacting Civil Code section 22.3. This section read in pertinent part:

The doctrine of governmental immunity from tort liability is hereby reenacted as a rule of decision in the courts of this State, and shall be applicable to all matters and all governmental entities in the same manner and to the same extent that it was applied in this State on January 1, 1961.<sup>99</sup>

The section contained a built in expiration clause providing that it would remain in effect until the ninety-first day after the final adjournment of the 1963 regular session of the legislature.<sup>100</sup>

Before the expiration of this moratorium statute the California legislature enacted those sections of the Government Code known as the Tort Claims act of 1963.<sup>101</sup> Section 815(a) provides that, except as otherwise provided by statute, a public entity is not liable for any injury arising out of an act or omission of the entity, its employee, or any other person. Therefore, if liability is to be found, a statute must be found to support it. Section 815.2 provides that the entity is liable for the acts of its employees performed within the scope of their employment if the employees could be held liable. Section 820.2 codifies the discretionary acts immunity rule, "whether or not such discretion be abused." Section 820.4 provides that a public employee is not liable for any act or omission in the execution or enforcement of any law, as long as he exercises due care. The section does state however that "[n]othing in this section ex-

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99. CAL. CIV. CODE § 22.3 (West Supp. 1976).

100. *Id.* During the period of this moratorium statute one court stated simply that no cause of action for malicious prosecution could be stated against the defendant county. *Prieth v. Dorsey*, 211 Cal. App. 2d 468, 27 Cal. Rptr. 476, 477 (1962).

101. CAL. GOV'T CODE § 810 *et seq.* (West 1966). For a good overview of the 1963 Tort Claims Act, see 5 SANTA CLARA LAW. 81 (1964).

onerates a public employee from liability for false arrest or false imprisonment."<sup>102</sup>

Immunity from malicious prosecution actions was preserved in section 821.6. That section provides that: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."<sup>103</sup>

This section continues the existing immunity of public employees, and "because no statute imposes liability on public entities for malicious prosecution, public entities likewise are immune from liability."<sup>104</sup>

In 1964 the Second District Court of Appeal applied the new statutes in an action for false arrest, false imprisonment and malicious prosecution.<sup>105</sup> The plaintiff had been arrested

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102. CAL. GOV'T CODE § 820.4 (West 1966).

103. *Id.* § 821.6.

104. *Id.* (Legislative Committee Comment). In his work on California Government Tort Liability, Professor Van Alstyne, who served as consultant to the California Law Revision Commission, stated that the extent to which state tort immunity statutes would apply in Federal Civil Rights Act cases was unclear. A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 5.64 (1964). However, he did cite a Ninth Circuit Court of Appeals case, *Sires v. Cole*, 320 F.2d 877 (9th Cir. 1963), which applied judicial immunity and quasi-judicial immunity for the prosecuting attorney in an action arising under the Civil Rights Act, 42 U.S.C. §§ 1981, 1983 (1970). In 1967 the United States Supreme Court stated that the well established common law immunity of judges was not affected by 42 U.S.C. § 1983. *Pierson v. Ray*, 386 U.S. 547 (1967).

The Supreme Court of the United States has just recently handed down the decision of *Imbler v. Pachtman*, 424 U.S. 409 (1976), which reaffirms the rule of absolute immunity protecting a public prosecutor from damage suits. The plaintiff in *Imbler* charged the prosecutor with withholding evidence at his earlier trial and filed a civil rights action under 42 U.S.C. § 1983 for loss of liberty. The Court reviewed the common law rule of quasi-judicial immunity and found it applicable to the action brought under the civil rights statute. Reviewing the question of public policy involved, the Court quoted the language of Learned Hand from the case of *Gregoire v. Biddle*, 177 F.2d 579 (2nd Cir. 1949) (*see text accompanying note 138 infra*), and concluded that in initiating a prosecution and in presenting the State's case, the prosecutor was immune from a civil suit for damages under section 1983. Mr. Justice White wrote a concurring opinion wherein he disagreed with the implication that the settled immunity extended to situations involving violations of constitutional rights. 424 U.S. at 433. Although the case arose in California, the Court did not discuss the California immunity statutes because the suit had been filed as a federal civil rights action and not as a malicious prosecution action.

105. *Shakespeare v. City of Pasadena*, 230 Cal. App. 2d 375, 40 Cal. Rptr. 863 (1964). The *Shakespeare* case is interesting because the cause of action arose after the *Muskopf* decision and the enactment of the moratorium statute, but before the enactment of the 1963 statutes. The court briefly discussed the concept that the plaintiff's cause of action had been "suspended." For discussion on the *Shakespeare* case, illegal arrests, and the 1963 Tort Claims Act, *see Note, Civil Liability for Illegal Arrests and Confinement in California*, 19 HASTINGS L.J. 974 (1968).



for trespass when he entered premises pursuant to a court order issued to prevent waste.<sup>106</sup> Although the defendants were protected from false arrest liability because the arrest had been made by a citizen,<sup>107</sup> and there could be no action for malicious prosecution under section 821.6,<sup>108</sup> the court stated that there may be a cause of action for false imprisonment due to failure to release after delivery of bail.<sup>109</sup> The court stated that the early immunity of a municipality for false imprisonment was not founded on a discretionary action theory, but on the sovereign immunity theory which had been eliminated by *Muskopf*.<sup>110</sup> Although the legislature had preserved the discretionary act immunity it had not reinstated the general concept of sovereign immunity.

The 1967 case of *Watson v. County of Los Angeles*<sup>111</sup> demonstrates an overextension of section 821.6 protection. In that case a deputy court clerk failed to inform a judge that the plaintiff had served his sentence.<sup>112</sup> Another clerk failed to keep proper records of the plaintiff's election to serve a sentence in lieu of paying a fine,<sup>113</sup> causing an arrest warrant to be issued after the plaintiff had already served his sentence.<sup>114</sup> The court read the words in section 821.6, "instituting . . . any judicial . . . proceeding," very broadly and held the clerks immune from liability under that section.<sup>115</sup>

This holding was later disapproved in *Sullivan v. County of Los Angeles*.<sup>116</sup> Such disapproval was partly based on the criticism of California Law Revision Commission consultant, Professor Van Alstyne, who stated that section 821.6 was to protect law enforcement and other officials from interference with their discretionary and quasi-judicial responsibility of instituting proceedings.<sup>117</sup> Professor Van Alstyne criticized the *Watson* court for not attempting to explain how the clerk's negligence in ministerial record keeping could "be transmuted

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106. 230 Cal. App. 2d at 378, 40 Cal. Rptr. at 865.

107. *Id.* at 382, 40 Cal. Rptr. at 867-68. See note 36 *supra*.

108. 230 Cal. App. 2d at 382-83, 40 Cal. Rptr. at 868.

109. *Id.* at 383-84, 40 Cal. Rptr. at 868-69.

110. *Id.* at 384-85, 40 Cal. Rptr. at 869.

111. 254 Cal. App. 2d 361, 62 Cal. Rptr. 191 (1967).

112. *Id.* at 362, 62 Cal. Rptr. at 192.

113. *Id.*

114. *Id.*

115. *Id.* at 363, 62 Cal. Rptr. at 192.

116. 12 Cal. 3d 710, 527 P.2d 865, 117 Cal. Rptr. 241 (1974).

117. *Id.* at 721-22, 527 P.2d at 872, 117 Cal. Rptr. at 248.

into the kind of discretionary determination . . . the immunity was designed to safeguard."<sup>118</sup>

In the 1969 case of *Vivell v. City of Belmont*,<sup>119</sup> plaintiff brought an action against the city and a city councilman for false arrest and imprisonment and malicious prosecution. The Belmont city councilman owned property adjacent to the plaintiff's, and when the two disputed over sharing the cost of a sewer line connection, a misdemeanor complaint was filed against the plaintiff for violation of a city sewer ordinance.<sup>120</sup> A judgment of nonsuit in favor of the city was affirmed.<sup>121</sup> The city was found to have absolute immunity from liability for malicious prosecution under previous case law and section 821.6.<sup>122</sup> In considering the question of the councilman's individual liability, the court noted that if he were acting within the scope of his employment then he would be protected under section 821.6, as was the city. If he was not acting within the scope of his employment, he would not be entitled to the immunity, nor could he render the city liable.<sup>123</sup>

In *Bradford v. State*<sup>124</sup> the dismissal of previous proceedings under section 1203.4<sup>125</sup> of the Penal Code was not entered

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118. *Id.* quoting A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY SUPPLEMENT § 5.63 (1969).

119. 274 Cal. App. 2d 38, 78 Cal. Rptr. 841 (1969).

120. *Id.* at 39, 78 Cal. Rptr. at 842.

121. *Id.* at 40, 78 Cal. Rptr. at 843. San Francisco police, not Belmont employees, were responsible for the arrest and brief imprisonment, consequently no cause of action was stated against the defendant city on those counts.

122. *Id.* at 40, 78 Cal. Rptr. at 843.

123. *Id.* at 41, 78 Cal. Rptr. at 843. In the following year the California Court of Appeal for the First District considered an action for malicious prosecution which was based on a theory of negligence. *Johnson v. City of Pacifica*, 4 Cal. App. 3d 82, 84 Cal. Rptr. 246 (1970). The plaintiff attempted to avoid the effect of section 821.6, which gives the public prosecutor immunity, by alleging that his investigators negligently conducted their investigation of the plaintiff's alleged forgery. The plaintiff argued that the investigators had a ministerial duty to conduct their investigation properly and were not protected by the code immunity. The court held that the investigators were indeed employees of a public entity protected by the statute. The dissent argued that the court overlooked the fact that the complaint was for negligence and that the Government Code section 821.6 was enacted for the purpose of protecting the discretionary conduct of public employees, not nondiscretionary conduct amounting to negligence.

124. 36 Cal. App. 3d 16, 111 Cal. Rptr. 852 (1973).

125. CAL. PENAL CODE § 1203.4 (West Supp. 1975) provides that upon completion and termination of probation the court shall dismiss the accusations or information against the defendant and he shall thereafter be released from all disabilities resulting from the offense. CAL. PENAL CODE § 11116 (West Supp. 1975) requires that such a report of dismissal be furnished to the Department of Justice. Previously the report was to be submitted to the Bureau of Criminal Identification and Investigation, but this was changed by amendment in 1972.

in the appropriate records and the plaintiff was arrested for failure to register as a sex offender. The plaintiff brought an action for wrongful arrest resulting from the negligent failure to make an appropriate record. The state argued immunity under Government Code section 815.2, on the basis of employee immunity from the broad interpretation of section 821.6 applied in *Watson*.<sup>126</sup>

The court of appeal found Government Code section 815.6 applicable.<sup>127</sup> Section 815.6 renders a public entity liable for the failure to perform mandatory duties, if the resulting injury is of the kind that the duty was designed to prevent.<sup>128</sup> The court stated that while derivative liability may be nullified by employee immunity, direct liability could only be negated by statute.<sup>129</sup>

The California Supreme Court narrowed the scope of section 821.6 in the 1974 case of *Sullivan v. County of Los Angeles*,<sup>130</sup> which was an action for false imprisonment resulting from confinement in the county jail beyond the proper term. The County's motion for judgment on the pleadings was granted on the basis of immunity under the *Watson* decision and section 821.6.<sup>131</sup> The supreme court reversed, holding that the County was potentially directly liable under section 815.6<sup>132</sup> for failure to release plaintiff as mandated by Penal Code section 1384,<sup>133</sup> and potentially derivatively liable under sections 820, 820.4 and 815.2 of the Government Code.<sup>134</sup> The court confined the application of section 821.6 to malicious prosecution actions,<sup>135</sup> specifically disapproving of the *Watson* decision and other decisions which had relied on the broad *Watson* interpretation of section 821.6.<sup>136</sup> Although *Sullivan* concerned an ac-

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126. 36 Cal. App. 3d at 20, 111 Cal. Rptr. at 854-55.

127. *Id.* at 19-21, 111 Cal. Rptr. at 854-55.

128. CAL. GOV'T CODE § 815.6 (West 1966).

129. 36 Cal. App. 3d at 21, 111 Cal. Rptr. at 855.

130. 12 Cal. 3d 710, 527 P.2d 865, 117 Cal. Rptr. 241 (1974).

131. *Id.* at 715, 527 P.2d at 867, 117 Cal. Rptr. at 243.

132. *Id.* at 722, 527 P.2d at 872, 117 Cal. Rptr. at 248.

133. *Id.* at 716, 527 P.2d at 868, 117 Cal. Rptr. at 244. CAL. PENAL CODE § 1384 (West 1970), requires a defendant to be discharged from custody if the court dismisses the action.

134. 12 Cal. 3d at 717, 722, 527 P.2d at 869, 872, 117 Cal. Rptr. at 245, 248.

135. *Id.* 720-21, 527 P.2d at 871, 117 Cal. Rptr. at 247.

136. *Id.* at 722, 527 P.2d at 872, 117 Cal. Rptr. at 248. Also in 1974 the California Court of Appeal for the Second District had stated that the immunity statute sections 821.6 and 815.2 "have been held to mean what they say," and that the restrictive liability statutes do not violate the constitutional rights to due process and equal

tion for false imprisonment, the general tone of the decision was to restrict broad application of the statutes in an effort to achieve just results. This was evidenced by its disapproval of the *Watson* decision on the basis of Professor Van Alstyne's criticism.<sup>137</sup>

The *Collins* court did not refer to the *Sullivan* holding, and by following earlier case law seems to have missed an opportunity to achieve more just results in a malicious prosecution situation by confining application of section 821.6 to the purpose for which it was enacted—that is, to protect officials who make discretionary decisions from harassing litigation, not to protect a public entity from liability for the negligent acts or omissions of its employees. The officer's re-filing of the second complaint was clearly prohibited by statute and could not, therefore, be termed a discretionary action.

### *Arguments Against the Rule of Immunity*

The language of Learned Hand quoted in the *Hardy* case is considered to be a succinct expression of the rationale behind the immunity rule:

[t]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.<sup>138</sup>

The rule exists because the factors in favor of it outweigh those against it, in the minds of the judiciary. The factors in favor of the rule have already been expressed in this comment: the protection of judicial and quasi-judicial officers in the performance of their duty. But there are other considerations.

Professor Jaffe noted several factors which make up the basis for the ministerial/discretionary act distinction and these

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protection. *Blackburn v. County of Los Angeles*, 42 Cal. App. 3d 175, 177-78, 116 Cal. Rptr. 622, 623 (1974).

137. See text accompanying notes 117-18 *supra*.

138. 48 Cal. 2d at 582-83, 311 P.2d at 496-97, quoting *Gregoire v. Biddle*, 117 F.2d at 581 (2d Cir. 1949).

provide a background against which the malicious prosecution rule can be examined.

These factors are the following: the character and severity of the plaintiff's injury, the existence of alternative remedies, the capacity of a court or jury to evaluate the propriety of the officer's action, and the effect of liability whether of the officer or of the treasury on effective administration of the law.<sup>139</sup>

The second and fourth of these factors have already been met or answered by the courts in California. The recent *Collins* case quotes from *White v. Towers* on the issue of alternative remedies and states that those who abuse their powers can be ousted from office, or called to account criminally if their conduct violates a penal law.<sup>140</sup> The fourth factor concerning effective administration of the law is simply a restatement of the previous arguments.

It is the first and third of these factors which raise the most important countervailing considerations to the rule of immunity. They could briefly be labeled as "damages" and "propriety."

In malicious prosecution actions the damages are usually not large in amount, as is the case with false imprisonment damages. Time spent in a cell or the loss of reputation does not add up to much in many cases. Indeed, as Professor Jaffe noted, the "breadth of official privilege has been made tolerable only because in certain characteristic cases the plaintiff's claim to damages is a marginal one."<sup>141</sup> In a malicious prosecution action the damages depend upon the character of the plaintiff, and the jury has to place dollar values on out of pocket loss, loss of reputation and humiliation.<sup>142</sup> This has led to the suggestion that a liquidated damages provision for recov-

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139. JAFFE, *supra* note 43, at 241. Professor Jaffe makes an introductory statement concerning this area of the law which is most interesting.

Indeed it will be one of the theses of this chapter that, despite innumerable statements to the contrary, the immunity is not in any realistic sense a device to protect the officer, but rather that it expresses, even if only subconsciously, the conclusion that the plaintiff should not recover at all.

*Id.* at 235. For further enumeration of factors supporting this subconscious conclusion, see 69 NW. U.L. REV. 489, 529 (1974).

140. *Collins v. City & County of San Francisco*, 50 Cal. App. 3d 671, 679, 123 Cal. Rptr. 525, 529 (1975).

141. JAFFE *supra* note 43, at 245.

142. See Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

ery would be more satisfactory, as it would tend to focus less on the "moral worth" of the plaintiff.<sup>143</sup> Despite the amount of damages involved, one who has been maliciously prosecuted has suffered some damage, and to deny any remedy because the action was instituted by a public official is to add insult to injury.

This leads to the second argument for allowing recovery. To tell a plaintiff that he must live with his damages because in this case he "can't sue the government" does not say much for the government's good faith towards the citizenry. The government should set an example by avoiding the label of law-breaker.<sup>144</sup> This is the third factor mentioned by Professor Jaffe, the "propriety" of the officer's or other public official's conduct, and the jury's capability of evaluating it. He believes that the area of malicious prosecution is one where the finder of fact "can be trusted to give the benefit of the doubt to those law enforcement agencies whose zeal in fact deserves protection."<sup>145</sup> This seems to be a sound approach.

It should be noted that the California Law Revision Commission made a study of governmental tort liability in connection with its recommendations for legislation at the time the 1963 statutes were adopted. In its study of the doctrine of sovereign immunity, the Commission noted the conflict between the competing interests involved. On the one hand there is the policy of not deterring public officials from doing their duty in fear of litigation. On the other hand there is an interest in protecting the innocent citizen from uncompensated injury.<sup>146</sup> The Commission noted that "[o]fficial immunity, coupled with sovereign immunity, results in almost a complete absence of effective protection to the latter interest although admittedly serving the former."<sup>147</sup> The Commission recommended that the immunity from malicious prosecution liability enjoyed

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143. *Id.* at 515. The author of this article raises some interesting points in the area of false imprisonment damages, such as the fact that those in the lower end of society are more vulnerable to illegal arrests; and if in fact a particular plaintiff has suffered a prior conviction, it can be used to impeach his credibility as a witness, thus making any recovery effort more difficult.

144. See Weissman, *The Discriminatory Application of Penal Laws by State Judicial and Quasi-Judicial Officers: Playing the Shell Game of Rights and Remedies*, 69 Nw. U.L. Rev. 489, 498 (1974), quoting from the dissenting opinion of Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

145. JAFFE *supra* note 43, at 255.

146. 5 CALIFORNIA LAW REVISION COMMISSION, SOVEREIGN IMMUNITY STUDY 413 (1963).

147. *Id.*

by public employees be continued so they would not be subject to harassment from "crank suits."<sup>148</sup> However, the Commission also stated that where public employees act maliciously in using their official powers, the injured person should not be left without a remedy.<sup>149</sup> The Commission stated that the employing public entity should be liable, with a right of indemnity against the employee in cases where the employee acted with actual malice.<sup>150</sup> Accordingly, the Commission had included in its legislative recommendations a proposed section 816, which read:

A public entity is liable for injury proximately caused by an employee of the public entity if the employee, acting within the scope of his employment, instituted or prosecuted a judicial or administrative proceeding without probable cause and with actual malice.<sup>151</sup>

This section was not enacted by the Legislature, even though the actual malice requirement would make recovery more difficult than it would be in actions against private parties.<sup>152</sup> But even if recovery would be difficult the fact that the Law Revision Commission proposed such a section adds weight to the argument that some recovery should be allowed in meritorious malicious prosecution suits brought against government entities.

### CONCLUSION

All of the concepts previously discussed—discretionary acts, ministerial acts, direct liability, derivative liability, and the general holding of the *Muskopf* case—should be re-evaluated and formulated into a new rule of decision which could continue to protect the interests of effective law enforcement but also protect the rights of the individual.

A section similar to the section 816 proposed by the Law Revision Commission could be enacted, or the present section 821.6 could be strictly construed to protect officials exercising discretionary functions, while giving an injured party a remedy

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148. 4 CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATIONS AND STUDIES 817 (1963).

149. *Id.*

150. *Id.*

151. *Id.* at 841.

152. 5 CALIFORNIA LAW REVISION COMMISSION, SOVEREIGN IMMUNITY STUDY 414-15 (1963).

against the employing entity under a provision similar to section 815.6. While the individual employee should be shielded from liability, except in those cases where he abuses his position and acts with actual malice, so as not to discourage him from his duty, the employing entity should at least be liable for some recompense to the mistakenly injured party. Private employers can be liable for the acts of their employees, public employers should also be liable for the acts of their employees which lead to the kind of damages for which an action from malicious prosecution would be the traditional remedy.

To counter the argument that greater liberality in this area would "open the floodgates" to malicious prosecution cases, effective preliminary claim procedures could be worked out,<sup>153</sup> or perhaps a specialized view of the malice requirement could be adopted with regard to public entity liability. In any case punitive damages are not recoverable against a public entity,<sup>154</sup> and a limitation to actual damages would probably prevent recovery of large sums. Even a token recovery would at least be some salve to the wounded dignity of an innocent victim who has been imprisoned, no matter how briefly, because of a bureaucrat's mistake.

*Stephen R. Oliver*

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153. CAL. PENAL CODE §§ 4900-06 (West 1970) provides for a claim procedure against the state to indemnify persons erroneously convicted and pardoned.

154. CAL. GOV'T CODE § 818 (West 1966).



